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91-1168

No. _____

Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1991

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INTERNATIONAL EATERIES OF AMERICA, INC.

Petitioner,

v.

BROWARD COUNTY, FLORIDA

Respondent.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Does a federal court of appeals, in concluding that the case of *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986), controls their analysis of the validity of a municipal ordinance, have the authority to extend or relax the legal requirements for constitutional validity enunciated in the cited decision?

II. Is a municipal ordinance regulating protected expression which does not adequately articulate, establish or support the existence of secondary effects "content neutral", as contemplated by the test for validity in *United States v. O'Brien*, 391 U.S. 367 (1968), or a proper time, place and manner regulation?

III. Is a municipal ordinance regulating protected expression which does not adequately articulate, establish or support the existence of secondary effects "narrowly tailored", as contemplated by the test for validity in *United States v. O'Brien*, 391 U.S. 367 (1968), or a proper time, place and manner regulation?

LIST OF PARTIES

The parties to the proceedings below were the Petitioner, International Eateries of America, Inc., a Florida corporation, d/b/a "Thee Dollhouse III" and the Respondent, Broward County, a political subdivision of the State of Florida.

There are no entities to report or list pursuant to Supreme Court Rule 28.1.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit, reported as *International Eateries of America, Inc. v. Broward County, Florida*, 941 F.2d 1157 (11th Cir. 1991) is reprinted in Appendix "A". The Memorandum Opinion Containing Findings of Fact and Conclusions of Law (Aronovitz, D.J.), reported as *International Eateries of America, Inc. v. Broward County, Florida*, 726 F.Supp. 1568 (S.D. Fla. 1989) is reprinted in Appendix "B". An earlier related action which included the

same parties and resulted in a Final Judgment and Memorandum Opinion is reported as *International Eateries of America, Inc. v. Broward County, Florida*, 726 F.Supp. 1556 (S.D. Fla. 1987) is reprinted in Appendix "C". The Order of the Court of Appeals denying Petitioner International Eateries of America, Inc.'s Petition for Rehearing is reprinted in Appendix "D".

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983 and § 1988 and 28 U.S.C. § 1331 and § 1343, the Petitioner brought this suit in the United States District Court, Southern District of Florida. On December 15, 1989, the Southern District entered Final Judgment against the Petitioner.

Petitioner appealed and the United States Court of Appeals for the Eleventh Circuit entered its Opinion on September 12, 1991, affirming the decision of the Southern District. International Eateries of America, Inc. timely filed a Petition for Rehearing. The Order denying the Petition for Rehearing was filed on October 16, 1991. This Petition is filed within ninety (90) days of that date. The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment 1

Congress shall make no law ... abridging the freedom of speech ...

Amendment 14, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protections of the laws.

UNITED STATES CODE

42 U.S.C. Section 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 U.S.C. Section 1988

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United

States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, . . . in any action or proceeding to enforce a provision [42 U.S.C. 1981-1983 . . .], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

ORDINANCES ENACTED BY BROWARD COUNTY, FLORIDA

Broward County Zoning Code, Article XIII Regulation of Certain Designated Uses, § 39-225 and § 39-226 are reprinted and included in their entirety in Appendix "E".

STATEMENT OF THE CASE

Petitioner, International Eateries of America, Inc. operates a nightclub known as "Thee Dollhouse III" in unincorporated Broward County, Florida. In all prior proceedings, the parties have stipulated that the primary form of entertainment at Thee Dollhouse III is non-obscene nude dancing. In April of 1986, the appropriate Broward County agencies served two (2) notices of violation upon International Eateries of America, Inc., alleging that the continued operation of the business was in violation of several sections of the Broward County, Florida Code of Ordinances.

The first notice alleged that Thee Dollhouse III was in violation of the Broward County ordinance section prohibiting the location of adult nightclubs within 500 feet of a residentially zoned district and within 1000 feet of a church (the "distance ordinances"). The second notice stated that Thee Dollhouse III was in violation of the

Broward County ordinance sections which purported to allow the legal operation of adult nightclubs only within a special zoning district established through appropriate zoning designation (the "special use ordinances"). To operate an adult nightclub, full compliance with all ordinance code sections was necessary.

Thee Dollhouse III is within 500 feet of a residentially zoned district. There are three residential properties less than 500 feet from the establishment as calculated by the property line measurement requirements imposed by Article XIII, § 39-225(c) of the Broward County, Florida Code of Ordinances. Appendix "E", Pages 1-3.

It is also undisputed that, applying the measurement of setback distance in accordance with the applicable ordinance section, a Jehovah's Witness Kingdom Hall is located approximately 885 feet from Thee Dollhouse III.

Finally, it is undisputed that Thee Dollhouse III is not in a zoning district which has been designated a special zoning district which would permit operation of adult night clubs pursuant to the special uses requirement.

Subsequent to the notices of violation issued by the County, International Eateries of America, Inc. filed an action in the United States District Court for the Southern District of Florida seeking to enjoin the County from enforcing the ordinances. The district court stayed the proceedings while International Eateries in good faith pursued administrative remedies with the County. Presenting several legal bases, International Eateries applied to the appropriate Broward County agency for a rezoning of the property and also to the Broward County Board of Adjustment for a variance from the distance requirements. The County denied the application for rezoning and concluded that it therefore had no reason to act on the application for variance.

In the first opinion precipitated by the instant sequence of events, *International Eateries v. Broward County*, 726 F.Supp. 1556 (S.D. Fla. 1987) ("*Dollhouse I*"), the district court held that the special use ordinances, as applied to International Eateries, violated the First Amendment because the ordinances did not advance a substantial government interest and did not leave available alternative channels for International Eateries to conduct its business. 726 F.Supp. 1556, 1566-67. Appendix "C", Page 28.

The district court, in *Dollhouse I* included in its Findings of Facts the correct observation that the "distance ordinances" were adopted in September of 1977 and June of 1978. No mention is made that the County presented or considered any testimony, evidence, studies, or any other type of supporting data in support of the adoption of these ordinances. No finding of fact was made that any articulated, supported justification for the valid adoption of the ordinances was ever properly established.

The district court found that, "Although no special zoning studies seem to have been made as a predicate for the adoption of the ordinances, testimony and evidence was adduced that they are modeled after the City of Detroit ordinances." Appendix "C", Page 11. (Emphasis added).

In March of 1985, the Board of County Commissioners adopted the special zoning district ordinances. The district court, in *Dollhouse I*, observed that only one plot of land, measuring approximately three quarters of an acre, existed in unincorporated Broward County which was zoned B-2B, the appropriate zoning district for an adult nightclub. No other area other than the one single site qualified for the zoning use of adult nightclubs at the time, and the procedures adopted by the Broward County Commission required that, for any location to be used for that purpose, there must first be a

petition for rezoning to establish a B-2B district. The existing zoning of International Eateries' property was General Business B-3. The existing land use designation for the property was commercial. Regardless of this, the restaurant and nightclub were deemed to be non-conforming under the zoning code specifically because of the content and nature of the entertainment provided by the establishment.

International Eateries' constitutional challenge to Broward County's special use ordinances was granted and the County was permanently enjoined from enforcing the ordinances. Appendix "C", Page 28.

In regards to the distance ordinances, the district court held that they were not unconstitutional on their face, but that International Eateries' challenge to the distance ordinances as applied was premature because the appropriate Broward County agency had not yet ruled on the application for zoning variance filed by the Petitioner. Id. at 1563-64. Appendix "C", Page 27.

On November 25, 1986, International Eateries filed a petition to the Broward County Office of Planning seeking to rezone the subject property from a General Business B-3 District to a Special Business B-2B District. On March 24, 1987, the Broward County Board of County Commissioners denied the petition for rezoning.

On December 15, 1987, Thee Dollhouse III filed a petition with the County's Building and Zoning Enforcement Division seeking an automatic waiver of the 500 foot residential district prohibition, pursuant to Section 39-225(b). That provision reads: It shall be unlawful hereafter to establish any designated use within unincorporated Broward County if the proposed location is within 500 feet of a residentially zoned district. This prohibition shall be waived upon the presentment to the building and zoning enforcement division of a written

petition requesting such waiver, signed by 51 percent of all those persons owning real property, residing or operating or managing a business within 500 feet of the proposed location of the designated use.

The petition filed by International Eateries contained the signatures of more than 51% of those persons residing and owning residential real property within 500 feet of Thee Dollhouse III. Despite this fact, the petition was rejected by the County because it did not contain any signatures of any persons ". . . operating or managing a business." The County denied the petition because it interpreted the ordinance as also requiring signatures of operators and managers of businesses within the area.

It was adduced through the Chief Zoning Inspector for Broward County that she had indeed received the petition from International Eateries and that she concluded there to be a larger "group or universe of potential signators" based on a review of zoning certificates maintained by the Zoning Department. This conclusion resulted directly from the County's interpretation of the word "or" as used in the waiver provision.

International Eateries then requested a waiver of the distance requirements from the County's Planning and Zoning Board as well as a waiver from the Broward County Commission. Both these requests were denied.

In June, 1988, International Eateries again filed an action in district court seeking to enjoin enforcement of the distance ordinances. *International Eateries v. Broward County*, 726 F.Supp. 1568 (S.D. Fla. 1989) ("*Dollhouse II*"). By stipulation and agreement, the parties agreed that the prior record and all exhibits in the earlier related action ("*Dollhouse I*") be taken into consideration by the district court through judicial notice.

As the district court again observed, no special zoning studies seemed to have been made as a predicate for

the adoption of the zoning ordinances and it was found that the ordinances were simply "modeled" after the City of Detroit ordinances at issue in *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976). Appendix "B", Pages 6-7.

The district court denied International Eateries relief, finding the ordinances valid. An appeal of this decision was taken to the United States Court of Appeals for the Eleventh Circuit. In its opinion, the Court of Appeals affirmed the district court. A petition for rehearing was filed by International Eateries which was denied on October 16, 1991.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS UPHOLDING THE VALIDITY OF THE BROWARD COUNTY ORDINANCES CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND THE FEDERAL COURT OF APPEALS AND INVOLVES A CONSTITUTIONAL QUESTION OF NATIONWIDE IMPORTANCE.

A. The Court of Appeals' Conclusion That it is Constitutionally Permissible to Regulate Protected Expression Through the Zoning Power Conflicts With This Court's Opinions in *Young v. American Mini Theaters*, 427 U.S. 50 (1976), and *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986) by Relaxing and Departing From the Requirements for Validity Enumerated Therein.

The complex issues involved in a judicial consideration of the regulation of "adult entertainment" and

the delicate balance needed between such regulation and proper respect for the protection of such material under the First Amendment have been the subject of jurisprudential effort of incredible magnitude. One explanation of this phenomena was made in the case of *Roth v. United States*, 354 U.S. 476 (1957):

> ". . . Sex, a great and mysterious motive force in human life, has undisputably been a subject of absorbing interest to mankind through the ages. It is one of the vital problems of human interest and public concern." *Id.* at 487.[1]

The Court of Appeals, in administering the case below, observed that the regulation of non-obscene nude dancing had often been addressed by the federal courts. The court stated that, on several occasions, this Court had assumed, without deciding, that nude dancing was protected

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[1] As the Court went on to say:

"As to all such problems, this Court said in *Thornhill v. State of Alabama*, 310 U.S. 88, 'The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment. The exigencies of the colonial period and the efforts to secure freedom from oppressive administration developed a broadened conception of these liberties as adequate to supply the public need for information and education with respect to the significant issues of the times. * * * Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.'" *Id.* at 487-488.

expression under the First Amendment.[2] The court also stated that:

> "In a related context, the Supreme Court has held that under some circumstances cities may enact zoning ordinances that require adult movie theatres to locate only in certain areas, provided that the purpose of the regulation is to control the 'secondary effects' of these businesses. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986); and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, (1976). These cases have been applied by the lower federal courts to the regulation of nude dancing. *See, e.g., International Food & Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); and *Envy Ltd. v. City of Louisville*, 734 F.Supp. 785 (W.D. Ky. 1990)." *International Eateries of America v. Broward County*, 941 F.2d 1157 (11th Cir. 1991).

Expanding further on their basis of analysis, the Court of Appeals undertook an examination of the first case in which this Court squarely addressed the protection afforded to nude dancing under the First Amendment, *Barnes v. Glen Theatre, Inc.*, _____ U.S. _____, 111 S.Ct.

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[2] Citing *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 66 (1981) ("nude dancing is not without its First Amendment protections from official regulation"); *see also Southeastern Promotions, Ltd. v. Conrad*, 422 U.S. 922 (1975); *California v. LaRue*, 409 U.S. 109 (1972), the Court of Appeals recognized not only the historical aspect, but the extensive judicial attention given the issue as well.

2456, 115 L.Ed.2d 504 (1991). Observing that, although this Court upheld the statute in *Barnes*, "[t]he effect of the Court's plurality holding on our case is not readily apparent."[3] The Court of Appeals then dissected the three opinions that made up this Court's five member majority.

In analyzing Chief Justice Rehnquist's Opinion, the court recognized the conclusion that, "[n]ude dancing of the kind sought to be performed here is expressive conduct within the outer perimeters of the First Amendment, though we view it as only marginally so." *Id.* at 2460. (Opinion of Rehnquist, C.J.) In determining the "level of protection to be afforded the expressive conduct at issue", the analysis under the four part inquiry of *United States v. O'Brien*, 391 U.S. 367, 377, (1968), was examined.

The first prong of the *O'Brien* test states that the regulation of symbolic conduct is valid if it is within the constitutional power of the Government. No debate is offered to this prong of the test other than the extent to which the other prongs impact this power.

The second prong of the test requires that the statute further an important or substantial government interest. Noting that it was impossible to discern other than from the text of the statute at issue in *Barnes* exactly what governmental interest the Indiana legislators had in mind, the Chief Justice concluded that, "[t]he statute's purpose of protecting societal order and morality is clear." *Barnes*,

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[3] The Court of Appeals explained:

> "Keeping in mind that '[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds,'' *Marks v. United States*, 430 U.S. 188, 193, (1977), we examine in greater detail the three opinions that made up the five-member majority." *Id.* at 1159.

111 S.Ct. 2456, 2461 (1991), and that such a purpose furthered a substantial governmental interest. *Id.* at 2462.

As for the third prong, the requirement that the interest to be protected be unrelated to the suppression of free expression, the Court of Appeals recognized that the Chief Justice found that, because the statute did not prohibit nude dancing, but rather all public nudity, the statute was not intended to suppress expression. *Id.* at 2463. The final *O'Brien* requirement, that the restriction on free expression be no greater than is essential to the furtherance of that interest, was found to be satisfied by Indiana's requirements of "pasties and a g-string" as the "bare minimum" necessary to achieve the State's interest.

Summarizing Justice Scalia's concurring Opinion, the court observed, "[t]he challenged regulation must be upheld, not because it survives some lower level of First Amendment scrutiny, but because, as a general law regulating conduct and *not specifically directed at expression*, it is not subject to First Amendment scrutiny at all." *Id.* (Scalia, J., concurring) (Emphasis added). Because of the conclusion that there was no specific focus toward "expression", no consideration of content-based characteristics was presumably necessary, and the Indiana statute needed only to survive the rational basis test to be valid under the Due Process Clause.

Justice Souter's Opinion was recognized as being in agreement with Chief Justice Rehnquist's Opinion that nude dancing was subject to First Amendment protection, and also agreed that the statute was properly analyzed under *O'Brien*. The Court of Appeals quoted Justice Souter's explanation that his separate opinion was to rest his concurrence not on the possible sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combatting the *secondary*

effects of adult entertainment establishments of the sort "typified" by the respondents in *Barnes'*.[4]

The Court of Appeals found that the only legally significant difference between the Opinions of the Chief Justice and Justice Souter was the societal interest viewed as sufficient to allow government regulation. According to the plurality, society has a substantial interest in protecting order and morality. According to Justice Souter, morality may not be a substantial government interest, but combating the alleged secondary effects "typified" by adult entertainment establishments was.

The third prong of the *O'Brien* test, content neutrality, was found by the plurality to be met, and the regulation "neutral" because it was aimed at all public nudity rather than only nude dancing. The Court observed that Justice Souter found this prong satisfied because the statute was aimed at secondary effects rather than at nude dancing itself.

After explaining their decisions as to their arrival at what they viewed to be the holding of the Court under the "concurrence in the judgments on the narrowest grounds" basis set forth in *Marks v. United States, supra*, the Court of Appeals specified that, prior to *Barnes*, their decision would have been guided by the secondary effects analysis in *Renton*, and that since Justice Souter's vote was necessary to uphold the statute, the secondary effects test

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[4]The Court of Appeals elaborated on Justice Souter's Opinion by quoting:

> "While it is certainly sound in such circumstances to infer general purposes 'of protecting societal order and morality . . . from [the statute's] text and history,' I think that we need not so limit ourselves in identifying the justification for the legislation here, and may legitimately consider Petitioners' assertion that the statute is applied to nude dancing because such dancing 'encourag[es] prostitution, increas[es] sexual assaults, and attract[s] other criminal activity." *Barnes*, 111 S.Ct. 2456, 2469 (1991).

was still controlling.[5]

Of critical importance, was the Court of Appeals recognition that a significant distinction between *Barnes* and the *Dollhouse III* case existed in that the *Barnes* statute prohibited all public nudity, regardless of its expressive content. In the Broward County ordinance at issue in this Petition, the preclusive distance and setback provisions apply only to "designated uses" which include the "adult

[5] In analyzing Justice Souter's Opinion, the Court of Appeals was silent as to the Justice's statement that, "I do not believe that a state is required affirmatively to undertake to litigate this issue repeatedly in every case.", or the statement that, "It therefore is no leap to say that live nude dancing of the sort at issue here is likely to provide the same pernicious secondary effects . . ."

In justification of the legislation at issue in *Barnes*, and Justice Souter's use of adverse secondary effects to establish content neutrality, the Court of Appeals did recognize that the Justice felt the broad concern for "social order and morality" did not satisfy *O'Brien*. Justice Souter's Opinion calls for additional consideration. To conclude that adverse secondary effects are "typified" by adult businesses on the basis of two reported cases from the *Barnes'* Circuit (in which prostitution was associated with nude dancing) is a very far reaching concept, which should be scrutinized against this Court's requirement of articulated and validly supported concerns to establish secondary effects as specified in *Schad* and *Renton*. See *Barnes*, 111 S.Ct. 2456, 2470 (1991).

Prejudicial preconceptions regarding the adverse secondary effects of adult entertainment have no place in a valid consideration of important First Amendment freedoms. The social science data does not support such conclusion: "Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior among youths or adults." (*President's Commission on Obscenity and Pornography*, 1970 Commission Report, Page 139). For an extensive investigation and discussion questioning the widely held cultural belief that the exposure to adult entertainment produces some kind of negative personal or social result, see M. Pally, *Sense and Censorship: The Vanity of Bonfires*, Americans for Constitutional Freedom, 900 Third Avenue, Suite 1600, New York, New York 10022 (1991).

The finding that there is "no leap" to impute the existence of adverse secondary effects to all adult nightclubs is a practice of great concern to Petitioner, particularly when uncontradicted evidence that such secondary effects do not exist at the subject establishment has been repeatedly ignored. Petitioner suggests that this practice is analogous to the designation of a "suspect classification", and therefore improper.

nightclub" involved in this case.[6]

This distinction was emphasized by noting that Justice Scalia, whose vote was also necessary to uphold the statute in *Barnes*, based his analysis on the "general" nature of the statute and specifically noted that "[w]here the government prohibits conduct *precisely because of its communicative attributes*, we hold the regulation unconstitutional." *Barnes*, 111 S.Ct. 2456, 2466 (1991) (Scalia, J., concurring) (emphasis original). The Court of Appeals concluded that Justice Scalia's analysis would not apply to the Broward County distance ordinance because the ordinance singled out nude dancing rather than broadly prohibiting all public nudity.

After concluding that *Renton* would control their analysis, the Court of Appeals explained further its decision regarding the basis for review of the Broward County distance ordinance:

> "Relying on *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, (1976), which upheld a zoning ordinance that limited the showing of adult films to certain locations,

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[6] Broward County Zoning Code, Article XIII Regulation of Certain Designated Uses, specifies in Section 39-225 Distance limitations between designated uses. These designated uses are defined in Section 39-226.

> "Sec. 39-226. Designated uses.
> The following uses are declared to be 'designated uses':
> (1) Adult bookstore.
> (2) Adult motion picture theater.
> (3) Adult mini motion picture theater.
> (4) Adult nightclub.
> (5) Massage establishment.
> (6) Encounter studio. (Ord. No. 77-48, § 3, 9-16-77; Ord. No. 85-18, § 1, 3-15-86)."

> the Court noted that 'zoning ordinances designated to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral time, place and manner regulations''. *Renton*, 475 U.S. 41, 49. (1986)" 941 F.2d 1157, 1161 (11th Cir. 1991).

In a lengthy footnote, the Court of Appeals responded to the potential complaint that, because they were addressing a regulation of nude dancing, as was the Court in *Barnes*, rather than a regulation of motion pictures, as was the Court in *Renton*, they should apply the *O'Brien* "symbolic conduct" analysis rather than the Court's "time, place and manner" analysis. The Court of Appeals recognized that there has been considerable confusion in this Court's cases as to when each analysis should apply, but went on to say that in recent years this Court has stated several times that, "in the last analysis [the *O'Brien* test] is little, if any, different from the standard applied to time, place, or manner restrictions."[7]

In the final description of the refined analysis used in rendering its decision, the Court of Appeals explained that this Court's time, place, and manner cases generally have required the third element that any challenged

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[7] Citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298, 104 S.Ct. 3065, 3071, 82 L.Ed.2d 221 (1984); *Barnes*, 111 S.Ct., at 2460 (opinion of Rehnquist, C.J.) (noting the similarities and applying *O'Brien*); and *Ward v. Rock Against Racism*, 491 U.S. 781, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989) (noting the similarities and applying time, place, and manner analysis), the Court of Appeals acknowledged that the wisdom of the trend toward a single standard has been questioned but it was sufficient for their purposes that this Court had determined that under current Court doctrine, the "answer should be the same regardless of which analysis is used." Footnote 2, 941 F.2d, at 1161.

regulation must be narrowly tailored to serve the government interest at issue. It was noted that when the Renton Court enunciated the two-part test of requiring that any challenge regulation serve a substantial government interest and allow for reasonable alternative avenues of communication, it cited authority which addressed the narrow tailoring requirement.[8]

In its unanimous decision, the Court of Appeals concluded that the Broward County distance ordinances furthered a substantial government interest in protecting the quality of urban life from the secondary effects of adult business, were narrowly tailored to serve that interest, and allowed for reasonable alternative avenues of communication.

This decision, recognizing only that the Broward County distance ordinances were "modeled" after the City of Detroit ordinances at issue in *Young v. American Mini Theaters, supra*, conflicts with this Court's Opinions in *Young v. American Mini Theaters* and *City of Renton v. Playtime Theaters, Inc.*, by relaxing and departing from the requirements for validity enumerated therein and conflicts with prior decisions of the federal Courts of Appeals.

By apparently relaxing and departing from the requirements needed to establish secondary effects, the Court of Appeals has created a confusing and dangerous precedent, likely to generate even further confusion among the other Circuits. It severely undermines the presumption of content neutrality vital to the validity of the Broward County distance ordinance at issue herein and any similar

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[8] *Clark v. Community for Creative Non-Violence*, 469 U.S. 288, 293 (1984); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981). The Court of Appeals also recognized that this Court has required the narrow tailoring element in cases decided after *Renton*, citing *Ward v. Rock Against Racism*, 491 U.S. 781 (1989); and *Frisby v. Schultz*, 487 U.S. 474 (1988).

federal, state, or municipal legislation.

Under either an analysis pursuant to the four-prong test enunciated in *O'Brien* or an analysis undertaken according to traditional time, place, and manner regulations, the decision of the Court of Appeals is a constitutional question of great nationwide importance and will have far reaching impact on the concept of content neutrality in assessing the validity of the regulation of expressive conduct.

1. The Court of Appeals Conclusion That the Broward County Distance Ordinances Further a Substantial Government Interest Conflicts With This Court's Opinions in *Young* and *Renton*.

The Broward County distance ordinances at issue herein impose distance and setback restrictions only on adult nightclubs. In *Renton*, this Court recognized that a city's interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial. *Renton*, 475 U.S. 41, 50 (1986).

The Broward County distance ordinances prohibit the location of an "adult nightclub" within 500 feet of a residentially zoned district or 1000 feet of a church. There can be no denial that the restrictions imposed by the ordinances are directed specifically at adult entertainment.

The fact that a classification is predicated on the content of material shown in adult establishments can survive a First Amendment challenge only if it can be shown that any applicable regulation or restriction on expressive activity is in no way based on the content of that

expression.[9] There may be no restriction whatsoever on expressive activity because of its content.[10]

In both *Young* and *Renton*, it was stressed that, even though the First Amendment protects communication in this area from total suppression, the state may legitimately use the content of material as the basis for placing designated uses in a different classification from other types of uses, if it can be shown that the regulation is aimed at secondary effects rather than content.

The critical issue then involves to what extent a city must go to to establish secondary effects in order to justify regulation which at first blush would appear content based. In *Young*, it was clear from the record that evidence regarding the existence of secondary effects was considered in the adoption of the City of Detroit ordinances at issue

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[9] "Above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. *Cohen v. California*, 402 U.S. 15, 24 (1971); *Street v. New York*, 394 U.S. 576 (1969); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269-270 (1964), and cases cited; *NAACP v. Button*, 371 U.S. 415, 445 (1963); *Wood v. Georgia*, 370 U.S. 375, 388-389 (1962); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *De jonge v. Oregon*, 299 U.S. 353, 365 (1937). To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.' *New York Times Co. v. Sullivan, supra*, 376 U.S., at 270." *Young v. American Mini Theatres*, 427 U.S., at 64-65.

[10] The disfavored nature of content-based restrictions seems to be a universally accepted element of American constitutional jurisprudence. *See e.g. Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972). For an excellent explanation see Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 Calif. L. Rev. 107, 139-48 (1982), and K. Lasson, *To Stimulate, Provoke, or Incite? Hate Speech and the First Amendment*, Volume 3, Number 1, St. Thomas Law Forum, 49-90 (1991).

therein.[11]

In a normal context, the legislative judgment is to control in cases in which the validity of a particular zoning regulation is "fairly debatable".[12] In a First Amendment context however, additional considerations regarding the "justification" of the exercise of the zoning power are invoked. This Court in *Renton* recognized that the enacting legislative body must have a reasonable basis for its belief that the harm to be protected against in fact exists. *Renton* held that a city need not conduct its own studies to make this determination but certainly suggested that there be some "seed" for such reasonable basis:

> "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence

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[11] In the opinion of urban planners and real estate experts who supported the City of Detroit ordinances, the location of several such businesses in the same neighborhood tends to attract an undesirable quantity and quality of transients, adversely affects property values, causes an increase in crime, especially prostitution, and encourages residents and businesses to move elsewhere. In this case, International Eateries offered uncontradicted evidence that Thee Dollhouse III had in fact caused no adverse effect on surrounding property values.

[12] This concept was consistent with the historical development of the then relatively novel concept of land use regulation addressed in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court broadly sustained the power of local municipalities to impose land use regulations through zoning, but the Court also laid out the general boundaries within which the zoning power must operate: Because one of the characteristics of a free society, as well as the dignity accorded to the rights of private ownership suggested by the Fourteenth Amendment, which provides in part "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . .", restrictions upon the free use of private land must find their justifications in "some aspect of the police power, asserted for the public welfare." The legitimacy of any particular zoning restriction must be judged with reference to all the surrounding circumstances and conditions. *Euclid*, 272 U.S. at 377, 388.

> the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Id.* at 51-52. (Emphasis added).

In the case of *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), this Court recognized that the power of local governments to zone and control land use is broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities; however, zoning power is not infinite and unchallengeable and must be exercised within constitutional limits.[13]

Even though the legislation at issue in *Schad* excluded all live entertainment and not just nude dancing, the Court investigated the evidence below which was introduced by the municipality to support the ordinances. Justice Blackmun stated in his concurrence:

> "First, I would emphasize that the presumption of validity that traditionally attends a local government's exercise of its

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[13] When a zoning law such as that at issue herein infringes upon a protected liberty, it must be narrowly drawn and must further a sufficiently substantial government interest. In *Schneider v. State*, 308 U.S. 147 (1939), for example, this Court recognized its obligation to assess the substantiality of the justification offered for a regulation that significantly impinged on freedom of speech:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of [First Amendment] rights." *Id.* at 161, 60 S.Ct., at 150.

> zoning powers carries little, if any, weight where the zoning regulation trenches on rights of expression protected under the First Amendment. In order for a reviewing court to determine whether a zoning restriction that impinges on free speech is 'narrowly drawn [to] further a sufficiently substantial governmental interest," the zoning authority must be prepared to articulate, and support, a reasoned and significant basis for its decision." (Blackmun, J. concurring), 452 U.S., *Id.* at 77.

In addition to this, the case of *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985), specifically cited by the district court in describing the analytical framework utilized in producing the opinion affirmed by the Court of Appeals, held that the goal of controlling the secondary effects of adult entertainment was both legitimate and significant enough to justify regulation, but where fundamental interests such as the right to free speech were at issue more than a "simple articulation" of some legitimate interest was needed.[14]

For such regulation to be valid, the government must show that any articulated concern had more than merely speculative factual grounds and that it was actually a motivating factor in the passage of the legislation. The idea that an ordinance is presumed valid merely because legislators have mimicked another ordinance that has been found constitutional in another context has been soundly rejected by this Court and other Circuit Courts. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 69-73, (1981);

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[14] *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 217-18 (1975).

Basiardanes v. City of Galveston, 682 F.2d 1203, 1213-14 (5th Cir. 1982); and *Krueger v. City of Pensacola, supra.*

In the instant case, the Court of Appeals stated that the district court found that Broward County "relied on the experiences of the City of Detroit in enacting its ordinances." This is unsupported by the record. The finding of the district court was contained in Footnote 5 of *Dollhouse II* and Paragraph 24 of the Findings of Fact contained in *Dollhouse I*:

> "Although no special zoning studies seem to have been made as a predicate for the adoption of the zoning ordinances, testimony and evidence were adduced that they were modeled after the City of Detroit ordinances." Appendix "B", Pages 6-7 and Appendix "C", Page 11. (Emphasis Added).

In essence, "modeling" is synonymous with "mimicking." By concluding that Broward County's distance ordinances are valid because the experiences of Detroit were relied on in a *Renton* context, the Court of Appeals has dangerously compromised the true holding of *Renton* and issued an Opinion in direct conflict with *Krueger v. City of Pensacola, supra,* and *Basiardanes v. City of Galveston, supra.*

2. The Court of Appeals Conclusion That the Broward County Distance Ordinances are Sufficiently Narrowly Tailored is Invalid Under Either the *O'Brien* Test or a Valid Time, Place, and Manner Regulation Consideration.

As specified in the description of the analytical framework utilized by the Court of Appeals in issuing its Opinion, the court recognized the requirement that legislation such as that at issue herein, since it impacts a fundamental right, must be narrowly tailored.

This Court has long labored in the development of an acceptable analytical framework to test the "narrowly tailored" standard.[15]

Generally speaking, in developing this framework, this Court has examined whether there is a different method of achieving the government's goals that places fewer restrictions on First Amendment freedoms. The "least restrictive means" test is the strictest type of tailoring requirement: in theory, the regulation will be struck down if there is any alternative method of achieving the government's goal that is less intrusive on speech. This concept demands scrutiny by this Court inasmuch as this test, a critical prong of the *O'Brien* test, has been used consistently to assess the constitutionality of similar legislation, but was abandoned by the Court of Appeals in the instant scenario.

The "narrowly tailored" standard, which the Court of Appeals did use, as recently interpreted by this Court, is considerably weaker, requiring only that the means/end fit be good, reasonable, and not an unnecessary intrusion on speech. All tailoring requirements, however, are concerned with the fit between the government end served by the

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[15] See *Grayned v. City of Rockford*, 408 U.S. 104 (1972); Adderley v. Florida, 385 U.S. 39 (1966); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Kovacs v. Cooper*, 336 U.S. 77 (1949); *United States v. O'Brien*, 391 U.S. 367 (1968); and *Schneider v. State*, 308 U.S. 147 (1939) as examples of this labor

regulation and the means used.[16]

This Court, in the case of *Ward v. Rock Against Racism, supra*, held that although a time, place, and manner regulation must be, "narrowly tailored" it need not be the least restrictive means of serving the government's interest. The tailoring requirement is satisfied as long as the "regulation promotes a substantial government interest that would be achieved less effectively absent the regulation"[17] and the regulation does not burden substantially more speech than is necessary to further the government's legitimate interest. *Id.* (Emphasis added).

It is precisely at this point that the concepts of content neutrality, the legitimacy of the interests articulated through competent substantial evidence, and the "narrow tailoring" requirement converge and take on a special significance in the instant case. If no legitimately articulated and supported concern over secondary effects can be established, there is no alternative other than to conclude that the legislation is not content neutral.

It should also be noted that any legitimate existence of secondary effects can be successfully and efficiently dealt with through a variety of other means that would have absolutely no impact on First Amendment rights.[18] In

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[16] See *Ward v. Rock Against Racism*, 109 S.Ct. 2746, 2758 (1989), and the cogent and probing discussion of consideration of content based regulation and the standards applicable to "content neutral" time, place, and manner regulations contained in: S. Williams, *Content Discrimination and the First Amendment*, 139 U.Pa.L.Rev. 615, 636-54 (1991).

[17] *Id.* at 2758 (quoting *United States v. Albertini*, 472 U.S. 675, 689 [1985]).

[18] In Florida, substantial legislation exists to meet any public health, crime, or other legitimate state interest regarding secondary effects. The legislation contained primarily in Florida Statute Sections 381, 386.01 through 386.051, 384, 120, 775.082, 775.083, 823.01, 823.05, 60.05, and 60.06 (Florida Statutes, 1989) all provide definite remedies for the swift abatement of any adverse secondary effects.

addition to this, International Eateries established through uncontradicted evidence that Thee Dollhouse III had not in fact caused any adverse effects on surrounding property values and that property values had actually increased at a higher rate after the opening of the establishment.

The Court of Appeals flatly rejected this argument, specifically supporting its conclusion by the fact that Broward County had appropriately tailored its distance ordinances to further the substantial government interest (which International Eateries argued was never legitimately articulated in the first place).

Under either a "least restrictive means" test or the more relaxed "narrowly tailored" test,[19] the distance

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A proper respect for the First Amendment would dictate that legislation such as the Broward County ordinances at issue herein must be held to the highest of standards in establishing the true existence and a true concern about secondary effects. It is undeniable that the removal of these secondary effects from the equation leaves only the conclusion that such legislation is content based.

[19] Expanding on the "narrow tailoring" concept, in the instant case, International Eateries availed itself of the waiver provision of the residential distance requirement which provided that the distance requirement "shall" be waived upon presentment of a petition signed by "51 percent of all those persons owning real property, residing or operating or managing a business within five hundred (500) feet of the proposed use." Although International Eateries presented a petition containing the signatures of a majority of those persons owning real property or residing within five hundred (500) feet of Thee Dollhouse III, the County interpreted the ordinance as requiring a majority of all the persons listed in the provision and therefore denied the waiver request.

In an interesting sequence of footnotes discussing the waiver provision, the Court of Appeals stated:

> "4 Of course, a waiver provision that allowed for arbitrary enforcement would be invalid. See *City of Lakewood v. Plain Dealer Publishing, Co.*, 486 U.S. 750, (1988) ('[I]n the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship.'); see also *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). In this case, however, the waiver provision leaves no room for arbitrary enforcement. It specifically states that a waiver 'shall' be granted

restrictions contained in the Broward County ordinance, as well as distance restrictions contained in other ordinances, would clearly indicate that Broward County and other municipalities are not legitimately addressing the secondary effects concerns properly.[20] It must be stressed that the need for articulating and supporting a reasoned basis for such legislation, when it concerns specific distance measurements and their impact on First Amendment

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upon the presentment of the requisite number of signatures."

The Court of Appeals then interestingly declined to address the use of the term "or" in the provision, logically asserted by International Eateries to indicate that a majority of any of the groups listed in the provision was sufficient to obtain a waiver, because "the interpretation of the County ordinance is purely a matter of state law." 941 F.2d, at 1164.

Blacks Law Dictionary (5th Edition, 1979) defines "Or":

"**Or**, conj. A disjunctive particle used to express an alternative or to give a choice of one among two or more things. . ."

There can be no denial that the waiver provision at issue herein, "allowed for arbitrary enforcement" and, even in light of the Court of Appeals statement in Footnote 4, would be invalid. This Court has unanimously recognized that the lack of procedural specificity and adequate procedural safeguards in legislation dealing specifically with adult entertainment in a First Amendment context is totally unacceptable. See *FW/PBS v. City of Dallas*, 110 S.Ct. 596 (1990). The Court of Appeals failed to recognize this precedent.

[20]Just for example, the Broward County ordinances at issue herein preclude adult businesses within five hundred (500) of a residential district and one thousand (1000) feet of a church. The adult use ordinance in Hillsborough County, Florida imposes a two thousand (2000) foot restriction and setback from both residential and religious uses. The Pinellas County, Florida adult use ordinance imposes a four hundred (400) foot restriction and setback from both residential and religious uses. The Petitioner would submit that these varying distances indicate that municipalities essentially impose the most restrictive regulations and that such legislation is as broadly tailored as possible as municipalities attempt to limit adult businesses in the most restrictive way and hope that any future legal challenge to such legislation does not leave "adequate alternative avenues of communication" (per *O'Brien, Renton*, etc.) concerns that would result in invalidity. The rationale behind this type of legislative action is inconsistent with appropriate respect for the First Amendment.

protected expression must be supported by some type of legitimate evidence.

As stated in Footnote 17, International Eateries availed itself of the waiver provision of the subject ordinance. The waiver provision was challenged by International Eateries again because it was not "narrowly tailored". The Court of Appeals was unpersuaded by the argument, stating that no authority indicating that the County was required to provide a waiver opportunity was presented. This would again invoke a consideration of the "narrow tailoring" requirement and International Eateries position that no sufficient justification for why the distance requirement of 1000 feet from a church needed to be twice that of the 500 foot residential requirements. Citing the *Walnut Properties, Inc. v. City of Whittier* cases,[21] the Court of Appeals again indirectly emphasized the need for an "articulated and supported basis" by quoting:

> "[T]he City's interest in preventing urban blight and downgrading of residential and commercial properties might logically support the ordinance's requirement that adult businesses by 1000 feet apart, but it might not support the requirement that they be 1,000 feet from a church. *Walnut Properties*, 808 F.2d, at 1335." Appendix "A", Page 19.

The Court of Appeals apparently misinterpreted International Eateries argument. The concern was not that the *Walnut Properties* case stood for the proposition that a

[21] *Walnut Properties, Inc. v. City of Whittier*, 762 F.2d 1020 (9th Cir. 1985); *Walnut Properties, Inc. v. City of Whittier*, 808 F.2d 1331 (9th Cir. 1987); and *City of Whittier v. Walnut Properties, Inc.*, 475 U.S. 1042 (1986).

1000 foot church distance ordinance was excessive, but that evidence concerning sufficient alternative avenues and other evidence, again legitimately articulating and supporting such distance regulations regardless of the specific preclusive distance contained therein, was necessary for constitutional validity.

This Court, which has so zealously protected the rights of the minority and the unpopular to free expression for so many years, cannot allow the Opinion of the Court of Appeals in this case to stand. The Court has clearly specified the requirements regarding the articulation, demonstration and support of the existence of adverse secondary effects to infer "content neutrality" in classifications that are otherwise content based. In the instant case, there is nothing in the record to indicate that the Broward County distance ordinances were anything more than "modeled" after the City of Detroit ordinances.

The decision below upholding the Broward County ordinances stands for two very dangerous propositions:

(1) A First Amendment protected activity can be regulated with virtually no evidence of the need for such regulation; and

(2) Content based regulation is acceptable despite the fact that the evidence needed to establish the existence of content neutrality is never articulated, presented, or supported.

In conclusion, this Court should grant review to ensure the appropriate application of its prior decisions, to eliminate conflict among the various Circuit Courts, and to address a constitutional question of nationwide importance.

Respectfully submitted,

DATED January 14, 1992

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